

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

356

IN THE
UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA ~~Circuit~~ United States Court of Appeals
for the District of Columbia Circuit

No. 23,748

FILED JUL 14 1972

Nathan J. Paulson
CLERK

RALPH D. SMITH and THELMA SMITH,
Appellants,

v.

ARBAUGH'S RESTAURANT, INC.,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PETITION FOR REHEARING AND SUGGESTION
FOR HEARING IN BANC

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The appellee, Arbaugh's Restaurant, Inc., by and through its attorneys, Donahue and Ehrmantraut, respectfully petitions this Court for a rehearing pursuant to Rule 40 of the Federal Rules of Appellate Procedure and suggests a hearing in banc, pursuant to Rule 35 of the Federal Rules of Appellate Procedure, of its decision of June 30, 1972, in the above-entitled case.

PRELIMINARY STATEMENT

Appellant commenced this action in United States District Court for the District of Columbia seeking damages for personal injuries sustained as a result of appellee corporation's alleged negligence in maintaining a hazardous condition on its premises, to wit, worn, slippery metal stairs. At the conclusion of trial on May 9, 1969, the jury returned a verdict for the appellee-defendant. On appeal, a panel of this Court consisting of Chief Judge Bazelon and Circuit Judges Wright and Leventhal held,

1. The long-standing common law classifications of invitee, licensee and trespasser are abolished in the District of Columbia;
2. The new legal standard of liability for landowners in the District of Columbia is "reasonable care under all the circumstances";
3. The case at bar was reversed and remanded for new trial.

In a separate concurring opinion, Circuit Judge Leventhal expressed strong doubts about eliminating these common law classifications in cases involving residential property owners. He expressly limited his concurrence to the result only, rather than the "broader sweep of the majority's rule."

POINTS AND AUTHORITY

I.

The Court in its opinion of reversal herein has drastically altered the legal standard of liability affecting landowners throughout the jurisdiction of the District of Columbia. In so altering the state of the law, the Court

did not receive the benefit of either appellate brief or oral argument on the issue. Neither the appellant nor the appellee ever raised the question of abolishing the current standard in their briefs. Nor was the topic broached during oral argument. See Judge Leventhal's concurring opinion, at 23 of slip opinion. Thus the appellee was not given an opportunity to be heard on this important point of law.

II.

The principle of law that classifies and graduates a landowner's duty of care in relationship to the status of the individual alleging negligence is firmly rooted in the tort law of the District of Columbia. *Firfer v. United States*, 93 U.S. App. D.C. 216, 208 F.2d 524 (1953), *Branan v. Wimsatt*, 54 App. D.C. 374, 298 F. 833, cert. denied, 265 U.S. 591, 44 S.Ct. 639 (1924). The principle continues to play a significant role in determining the liability of landowners in almost every jurisdiction in the United States. See Prosser, Torts §58 at 357 (4th Ed. 1971). Thus, there can be no doubt that the question of law involved here is one of exceptional importance, one which should be fully briefed and argued and which properly should be decided by the Court in banc.

III.

The Court Reorganization Act of 1970 has declared the District of Columbia Court of Appeals to be the court of last resort on all questions of law for the District of Columbia after February 1, 1971. See D.C. Code, §11-102 (1967 ed., Cum. Supp. v, 1972). In construing this section of the Code, the D.C. Court of Appeals has held that, as the highest court of the District of

Columbia, it is analogous to the highest court of a state, and that only those decisions of the United States Court of Appeals rendered prior to February 1, 1971, are *stare decisis* for the D.C. Court of Appeals. *M.A.P. v. Ryan*, 258 A.2d 310 (D.C. Ct. of Appeals, 1971). Thus, the only precedent interpreting Congress' intent in this matter indicates that at the time the instant case was decided, this Court had lost its status as the highest court for the District of Columbia. Therefore, like all other U.S. Courts of Appeals, it was bound to apply the law of the local jurisdiction on questions of substantive law. *Erie v. Tompkins*, 304 U.S. 64. As noted above, the invitee-licensee-trespasser classifications are clearly the law of this jurisdiction. Therefore, under the Court Reorganization Act of 1970 and the principle of *Erie*, the Court in this case was bound to apply the standard status classifications in suits against landowners. The court was without jurisdiction to change the substantive law on this question.

IV.

Even if the Court had jurisdiction to alter the substantive law of the District of Columbia, such a drastic change should properly be submitted to the entire Court instead of a single three judge panel. The announced change in the law potentially has far-reaching consequences for landowners in the District of Columbia. Even a mere residential property owner must now speculate as to how great a degree of care a jury is likely to hold him accountable for and insure against such myriad, unknown risks. As Circuit Judge Leventhal points out, the majority opinion "exposes many less-affluent homeowners—whose modest home represents

their major capital asset—and apartment dwellers, to lawsuits not previously permitted This may not be sound public policy.” Slip opinion at 22-23.

The opinion indicates that the decision follows the “modern trend.” However, abolition of the categories of trespasser, licensee or invitee has been discussed by commentators over the past two decades. Only very recently has any jurisdiction decided to adopt a new legal standard in this area, and even this late response is limited to three jurisdictions—California, Hawaii and Colorado. See *Rowland v. Christian*, 69 Cal. 2d 108, 70 Cal. Rptr. 97, 433 P.2d 561 (1968); *Pickard v. City and County of Honolulu*, 452 P.2d 445 (S. Ct. Hawaii 1969); *Mile High Fence Co. v. Radovich*, 489 P.2d 308 (Colo. S. Ct. 1971); Prosser, Torts, §62 at 398-99 (4th ed. 1971). Thus the “modern trend” is not so overwhelming as to foreclose rationale argument and open discussion of the desirability of abolishing these categories of status that have long served as practical guidelines in the administration of the law in jury cases. The fact that England has legislatively abolished the categories is best explained by the fact that the jury has virtually disappeared from negligence actions in England. See Prosser, Torts, §62 at 399 (4th ed. 1971). In American jurisdictions, where jury decision still predominates, these categories serve as a method by which the jurors can better delineate the case at hand and thereby come to an accurate appraisal of liability. In any event, the decision of this Court represents a sharp departure from precedent and portends broad policy ramifications that should be briefed and argued before the entire nine member Court.

V.

Finally, the case at bar raised only the issue of whether or not a public employee, on the business premises of another in performance of his official duties, is an invitee or mere licensee. The lower court left the question to the jury. The appellant contended that the court should have ruled that the Health Inspector, as a public employee performing his official duty, is an invitee as a matter of law, as other jurisdictions have previously ruled. See Prosser, Torts, §61 at 395-98 (4th ed. 1971). At most, this connection raises the question of whether the distinction between invitee and licensee should be maintained. Whether or not the classification of trespasser should be abolished was not even remotely put in issue. In accordance with the long-standing policy which limits appellate courts to review of matters raised in appeal (*see, e.g.*, 5 Am. Jur. 2d §723), it would seem incumbent upon the Court to limit their decision to the invitee-licensee distinction. In addition, there is a large policy issue as to whether or not the abolition of the common law categories should be extended to all landowners, or limited to business or commercial proprietors. The majority opinion includes all landowners even though the issue presented in this case only involved a business proprietor. Judge Leventhal raises these same doubts about the "broader sweep of the majority's rule," limiting this concurrence to the result. In view of these doubts it would be best to have these important issues briefed and argued before the Court in banc.

CONCLUSION

The appellees submit that the important issues of law and policy raised by the opinion of this Court, both as to the drastic alteration of the substantive law of this jurisdiction and as to the effect of the Court Reorganization Act of 1970, warrant a rehearing by the panel or preferably by the entire Court.

Respectfully submitted,

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT AND APPENDIX
United States Court of Appeals
for the District of Columbia Circuit

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APPELLANT'S BRIEF

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The Questions Presented are:

1. Whether a District of Columbia health inspector lawfully upon the premises in the performance of his official duties to inspect a restaurant is entitled, as a matter of law, to the protections afforded a business invitee.

2. Whether the Court committed prejudicial error in declining to instruct the jury as a matter of law that the status of the plaintiff below was that of an invitee and in submitting to the jury the question of whether the plaintiff was an invitee or a licensee, where the uncontradicted evidence established that at the time of the plaintiff's injury on defendant's premises, the plaintiff was engaged in the performance of his official duties as a health inspector assigned to inspect defendant's restaurant.

3. Whether the Court committed reversible error through confusing instructions to the jury, by giving the jury conflicting instructions on the issue of whether the plaintiff was an invitee or a licensee, after first instructing the jury that the plaintiff was in fact an invitee, prior to which the Court had denied plaintiff's requested instruction to that effect.

4. Whether the Court committed prejudicial error in extemporaneously instructing the jury that if it found that there was grease present and a slippery condition on the stairs where plaintiff fell, it must further find that the defendant had reasonable notice or awareness of these hazardous conditions, where the stairs in question were in an area removed from public usage, and used by employees in going to and from the basement barbecue kitchen.

This case has never previously been before this Court under the same or similar title.

REFERENCES TO RULINGS (Rule 8e)

1. The Court's refusal to grant Plaintiff's Instruction No. One, that plaintiff, in his capacity of health inspector of defendant's restaurant, was an invitee on defendant's premises. (App. 11).

2. The Court's refusal to instruct the jury as a matter of law, in view of the uncontradicted evidence, that the plaintiff was a bus-

iness invitee, and the Court's instruction that the jury should decide whether plaintiff was an invitee or a licensee. (App. 11)

3. The Court's extemporaneous instruction to the jury to the effect that proof of notice is required respecting the presence of a foreign and hazardous substance on the stairs, when the evidence established that these were private stairs, used only by employees in connection with performance of and in connection with the business of the defendant. (App. 17)

STATEMENT OF THE CASE

This action was commenced by Appellants in the United States District Court for the District of Columbia seeking \$65,000.00 damages for personal injuries and loss of consortium resulting from the negligence of the defendant corporation through its agents and employees in creating and permitting a hazardous condition on its premises, consisting of worn wet and slippery metal stairs with an accumulation of grease thereon, and in its failure to correct these conditions and in its failure to warn plaintiff, Ralph D. Smith, of these hazards. The stairs in question were located in rear of an adjacent building and were used by employees only in connection with descending to and ascending from barbecue kitchen located in basement, for purpose of transporting pans of barbecued spare ribs and other foods from kitchen to main restaurant building for storage and service in dining rooms. (App. 10) All spare ribs were barbecued in this basement kitchen. (App. 10)

Jurisdiction of the trial court was invoked under the provisions of Title 28 U.S.C. § 1332 (a). Jurisdiction of this Court is invoked under Title 28 U.S.C. § 1291.

Trial was commenced before the United States District Court for the District of Columbia on May 5, 1969, and at the conclusion of trial on May 9, 1969, the jury returned a verdict for the defendant. Appellants moved for a new trial on May 19, 1969. Motion

for new trial was denied on October 20, 1969. This appeal was filed on October 28, 1969, and an amended notice of appeal was filed on November 6, 1969.

STATEMENT OF FACTS

On March 4, 1966, Appellant, Smith, a District of Columbia Health Inspector for more than twenty years, was directed by his supervisor to inspect the barbecue kitchen in Appellee's restaurant. supervisor to inspect the barbecue kitchen located in the basement of a building adjacent to Appellee's restaurant. (App. 3) The inspection was necessitated by a grease fire which had occurred in one of the barbecue pits located in this kitchen several weeks previously, damaging the kitchen. (App. 9) The purpose of the inspection was to insure that the necessary kitchen repairs had been completed (App. 3) Two large barbecue pits, each six feet wide and twelve feet deep were located in this basement kitchen. (App. 7) Spare ribs were barbecued here and via a set of about 20 metal steps (App. 4) upon which plaintiff fell, brought up the stairs, across an area way and into the rear door of the restaurant and into the Kitchen of the main building where the ribs were stored after cooking. (App. 10) Large amounts of cooked grease were created in cooking ribs and grease fires occurred. Cooked ribs were transported in tray from barbecue Kitchen up the stairs to main building for storage in refrigerator and service to customers. The defendant's restaurant was licensed by the District of Columbia Government and under the supervision of the Health Department which approved issuance of restaurant licenses. (App. 4) The inspection was being made by Appellant as part of his official duties a health inspector to assure cleanliness, maintenance of equipment in proper working order and to check related health aspects of the restaurant operation (App. 3).

After entering appellee's rear areaway from the parking lot, appellant began to descend the steel stairs leading directly to the cooking area (App. 7, 8). These stairs led to the barbecue kitchen where

spare ribs were barbecued in large pits and other foodstuffs prepared and from whence they were transported via a set of metal stairs leading up to the areaway and across the areaway into the main restaurant building which housed the main kitchen and where the public was served (App. 3,4,5,7,10)

A garden hose connected to the adjacent wall of the main restaurant building extended across the areaway to the barbecue kitchen stairs where they intercepted the stairs at a point midway and coiled down the concrete landing at base of stairs. (App. 5). While holding the hand rail and descending the stairs, when appellant inspector reached a point about two steps above where the hose lay, his left foot suddenly skidded out from under him, causing him to fall backwards and to land heavily on his back, breaking his grip on the hand-rail. The force of the fall caused him to bounce all the way to the bottom of the set of metal stairs. (App. 5,10).

The sound of the fall and the cries of the Appellant brought the cook, James Lane, out from the barbecue kitchen. Mr. Lane assisted appellant up the stairs slowly. While ascending the Appellant observed that the steps were greasy and that grease was spilled on the stairway at the point where he fell. (App. 5,6) He also noted that the metal stairs approximately at the point where he fell were smooth and rounded off from continuous wear and that the corrugation was broken in several places. (App. 6). He also noted the stairs were wet, although the streets, sidewalks and other areas were not wet at that time. (App. 6)

The foregoing description was substantiated by appellant's supervisor, Mr. Joseph Sterling, who examined the steps several hours later, and found the steps to be badly worn, extremely smooth on the edges and with a light coating of grease (App. 10).

After ascending the steps, appellant crossed areaway to main building, entered through kitchen to the main dining area where he

remained until removed to the George Washington University Hospital, by ambulance. (App. 6) Due to the severity of his back injury, appellant lost substantial amounts of time from work, incurred substantial medical expenses, and was eventually retired on disability by reason of the aforesaid back injuries. (App. 7)

The Defendant below submitted only one lay witness, James Lane, who substantiated that the Appellant health inspector was descending the kitchen stairs at the time of his fall. At the conclusion of the trial, in view of uncontradicted evidence, that the appellant was on the defendant's premises in his capacity as Health Inspector for making an official inspection, counsel for Plaintiff submitted "Plaintiff's Instruction No. 1" (App. 2) instructing the Jury that the plaintiff, in his capacity of a District of Columbia Health Inspector was in the status of an invitee on defendant's premises at the time of his fall and that defendant owed invitees the duty to maintain the premises and stairways in a reasonably safe condition for invitees.

Initially, the Court indicated that it had concluded to grant this instruction and would so instruct the jury. However subsequently the Court advised both counsel in chambers that it would not do so, but rather would leave the matter of whether the Plaintiff below was an invitee or a licensee for determination by the jury as a question of fact. Accordingly, both counsel argued these points extensively in their final argument.

Prior to commencement of the Court's charge, the Court denied Plaintiff's Instruction No. 1, to which counsel took prompt exception:

"Mr. Goldberg: Your Honor, I did wish, if I might, to note an exception to the denial of my Instruction No. 1, which I did submit. That was an instruction in which I requested the Court to advise the Jury that the plaintiff was in the status of an invitee. In view of the fact that

the Court is leaving this decision as to whether he was an invitee or licensee to the Jury, I would like to note an exception to the denial."

The Court: It will be denied."

Despite the Court's denial of Pltff.'s Instr. No. 1, during its charge to the Jury, the Court reversed its position, and utterly confused the Jury in the following manner:

(a) First instructed and then reiterated to the jury that the plaintiff below, was, as a matter of law, an invitee on the premises of the defendant below at the time of the occurrence in question. This was a clear and unequivocal instruction:

The Court: "The Court has ruled that Mr. Smith was an invitee, and an invitee is a person who goes upon the property of another for the purpose of carrying on some transaction either for the benefit of himself and the owner of the property in question" (App. 13, 14)

(b) The Court then proceeded to give the jury the standard instruction regarding definition of and duty toward an invitee, i.e. Standard Jury Instruction No. 129 (App. 15)

(c) Having instructed the jury that the plaintiff was an invitee, the Court then proceeded to give the jury the standard instruction regarding definition of and duty toward a licensee, i.e., Standard Jury Instruction No. 127 (App. 15)

(d) Thereafter, during its charge, the Court retracted the instruction that the plaintiff below was an invitee and advised the jury that it was within its discretion to determine whether the plaintiff below was a licensee or on invitee at the time of his fall on the defendant's premises. (App. 15, 16)

At the conclusion of the charge, counsel for plaintiff again excepted to the Court's denial of Plaintiff's Instr. No. 1, and in

permitting the jury to determine whether the plaintiff was in fact an invitee or a licensee, contending that plaintiff was as a matter of law an invitee having gone on the premises of the defendant in the capacity of an inspector and on the defendant's business. This was again denied by the Court.

Counsel for the defendant then asked orally for an instruction by the Court as respects the necessity for actual or construction knowledge on the part of the defendant as respects the presence of grease on the kitchen stairs. (App. 18) Counsel for the plaintiff objected to such an instruction for the reason that the grease was present on stairs used only to transport barbecued spare-ribs from the detached basement kitchen to the main restaurant building, and were not used by the customers. The only outsiders using these stairs were deliverymen who brought sealed cartons of raw ribs to the kitchen from time to time. Counsel for plaintiff argued that since the evidence was that of "spilled grease" on a private stairway and obviously used virtually entirely by employees, the requested instruction was not appropriate and should not be orally given. The Court overruled plaintiff's objections and granted the following oral instruction:

The Court: Ladies and gentlemen of the Jury, the Court has already told you that it will not comment on testimony that has been submitted to you. The Court, however, does instruct you that if there was a foreign substance, if you should find that there was a foreign substance on the staircase in question, then and in that event, I believe it was referred to as grease, then and in that event, you must find that the person in charge, Mr. Lane, or the owner, someone in charge, had sufficient time to ascertain that condition." (App. 17)

When counsel for the plaintiff objected to the instruction and requested the insertion in the instruction of the clause "in the exercise of due care", the Court commented as follows:

The Court: "It is not going to be decided on that any-way. It is a question of how much you are going to get."
(App. 17.)

Later the next day, during jury deliberation, the jury sent the following note to the Court:

"Instructions on preponderance of evidence and instructions on verdict if preponderance does or does not exist. Also, whose burden is the preponderance of the evidence?"

The Court not only answered the question propounded by the jury, but further instructed the jury on the point of negligence and contributory negligence. The jury was then excused and later returned a verdict for the defendant below. Appellant moved for a new trial, but such motion was denied some five months later. This appeal followed.

SUMMARY OF ARGUMENT

1. Appellant, a municipal health inspector, is considered a business invitee while on respondent's property in his official capacity. This contention is well supported by the major text writer's, the restatement of the Law on Torts (2nd), and by the great weight of decisions in this country today.

The District of Columbia Courts have adopted the Doctrine of Mutual Benefit, which doctrine is applicable to the present case. An inspector who performs a necessary service with resulting benefit to the possessor of the premises or land, is considered as having an invitation, and thus is a business invitee.

The sole criteria question in regard to this point is whether appellant as a health inspector rendered such a necessary and beneficial service to the respondent. Appellant's services as health inspector of appellee's restaurant were essential to issuance and retention of the restaurant license held by defendant, and accordingly constituted a

valuable benefit. The evidence was uncontradicted and virtually stipulated that appellant was injured while performing official duties. The pretrial statement in great measure embodied this. Since the facts established that plaintiff was a health inspector performing official duties were not in dispute, under *Arthur vs. Standard Engineering Co.*, 89 U.S. App. D.C. 399, the question as to whether he was an invitee or a licensee was one for the Court, and the Court should have ruled that plaintiff was an invitee and should have granted the plaintiff's instruction to that effect. As such, it was the Court's duty to instruct the jury that appellant was a business invitee as a matter of law while on respondent's property at the time of the accident, and hence was owed a higher degree of care than that owed to a licensee. Furthermore, under this standard appellee was liable for any hazardous condition upon his premises of which it was aware or in the exercise of normal care, should have been aware.

2. The instructions by the Court, given as they were to a new jury, were totally confusing on the factual issue submitted to the jury as to whether the male plaintiff was an invitee or licensee. Having first advised counsel in chambers that Plaintiff's Instruction No. 1 would be denied and the issue of whether plaintiff were invitee or licensee submitted to the jury, both counsel then argued their respective positions vigorously. Following this, the Court confounded jury and counsel by deliberately and carefully charging the jury that the plaintiff was in fact an invitee and then proceeded to define an invitee; This, in effect, took from the jury the question of fact which counsel had been advised would be given to the jury and which was extensively argued and constituted a ruling as a matter of law. The Court then, without explanation proceeded to define a licensee and duties toward a licensee. Then, the Court retracted its initial instruction declaring the plaintiff to be an invitee; by this time, it is respectfully submitted, the jury was totally confused, and more important, the plaintiff was unquestionably prejudiced by the vacillations and self-reversals by the trial Court.

The appellant respectfully submits that in all of the aspects set forth above, the Trial Court erred, and in so doing committed prejudicial and reversible error.

3. At the close of the Court's formal instructions to the jury, the Court extemporaneously instructed the jury that respondent must have had actual knowledge of the slippery condition of the stairs in order to be held liable. This extemporaneous instruction was both prejudicial in its content as phrased, and was totally erroneous in light of the testimony. The stairs on which appellant slipped because of the presence of slippery grease spread on smoothly worn wet stairs, freshly hosed. These stairs were not public stairs but led to a basement kitchen located in a building located across from the main restaurant building. Access to this stairway was limited to employees bringing foods from the kitchen to the main building where patrons of the restaurant were served. Occasionally, boxed deliveries were made to the kitchen, but the evidence was that the stairs were virtually solely used by the employees, and the evidence of spilled grease excluded that such grease could have come from boxed products. The law is well settled in this jurisdiction that proof of actual or constructive notice is not required where the condition is caused by the negligence of the occupant, his employee or agent.

ARGUMENT

I

THE COURT ERRED (1) IN FAILING TO RULE AS A MATTER OF LAW THAT APPELLANT WAS A BUSINESS INVITEE WHILE UPON APPELLEE'S PROPERTY AT THE TIME OF HIS ACCIDENT. (2) IN SUBMITTING TO THE JURY THE ISSUE OF WHETHER PLAINTIFF WAS AN INVITEE OR A LICENSEE (3) IN DENYING PLAINTIFF'S REQUESTED INSTRUCTION THAT HE WAS IN THE STATUS OF AN INVITEE WHILE INSPECTING DEFENDANT'S RESTAURANT PREMISES.

The law governing the status of a public health inspector while on another's land in his official capacity is well settled. A public health inspector, such as appellant, Ralph Smith, while performing a mandatory inspection of appellee's barbecue kitchen, is entitled to the same standard of care as is the traditional business invitee.

The *Restatement of the Law of Torts*, 2d Par. 332, differentiates between a "public invitee" and a "business invitee". A public invitee is defined as a "person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public." (Page 176, Chapter 13). The Restatement defines a "business invitee" as "a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land."

At page 179, ss. (3) (e), the Restatement distinguishes between the two separate classes of business invitees. The first are those

"who are invited to come upon the land for a purpose connected with the business for which the land is held open to the public as where a person enters a shop to make a purchase or to look at goods on display.

"The second class includes those who come upon the land not open to the public for a purpose connected with the business which the possessor conducts on the land"

At subsection (3) (h) at page 180, the Restatement discusses the immediate point; "If the business of the possessor of land cannot be lawfully carried on without the presence of an inspector or other official, the official is a business visitor of the possessor." However, the Restatement does not stop here. In Title F, under the subject heading "Liability of Possessors of Land to Persons Entering in the Exercise of a Privilege and Independently of Possessor's Consent", it is said in Para. 345, entitled "Persons Entering in the Exercise of a Privilege":

"(2) The liability of a possessor of land to a public officer or employee who enters the land in the performance of his public duty, and suffers harm because of a condition of a part of the land held open to the public is the same as a liability to an invitee."

It is obvious from the foregoing that the Restatement considers one situated as appellant to be a business invitee. Granting that the various Restatements were never adopted by this jurisdiction, or any other, as statutory law, Courts have constantly looked to these formidable works for guidance and edification. The Restatement as such represents a compilation of both the best reasoned and majority Court decisions, and the major authorities on the law of torts.

It is also clear that the major writers concur with the Restatement on this point. For example, 2 Harper and James on Torts, 1499, indicates:

"There is a miscellaneous group of public employees who enter the land in connection with governmental services performed for the occupier with governmental regulation of the occupier's business. Such visitors are generally assimilated to invitees."

Turning now to the body of decisional law in the District of Columbia and throughout the country, we find that the majority of modern decisions have employed the aforementioned reasoning. An early case within the District of Columbia on this point is *Dashields v. Moses*, 35 App. D.C. 583. While the case refers to an insurance inspector as contrasted to a public health inspector in the case at bar, the reasoning and that which followed in other cases is clarifying. In this case, the plaintiff, an insurance inspector, was injured while upon the insured's premises in his official capacity. Under the terms of the insured's policy, the insurance company reserved as a condition precedent to the issuance of the policy and to its liability thereunder, the right to make inspections of the insured's sprinkler system at all reasonable times. The Court held that plaintiff, a duly authorized

agent of the insurance company, had an implied invitation to visit the premises. "This constituted an invitation to the appellant to make an inspection." Appellant was not, therefore, in the eyes of the law, a mere licensee". *Dashields v. Moses*, supra.

In *Dashields* the Court employed the doctrine of mutual benefit. Under this concept one, such as an inspector, who is upon the premises of another, in pursuance of a mutual interest, is entitled to the status of an invitee. Again quoting from the *Dashields* case, supra, in response to the contention that the inspection of the sprinkler system was not for appellee's benefit, said:

"It is difficult to understand on what ground the appellee can claim that the inspection of this plant was not for its own benefit. It was not only a condition of the insurance policy which gave the insurance company the right to send appellant to make the inspection, it was for the benefit of the appellee that such inspections should be made so that damage by leakage might, by such inspection, be averted. That appellant had a right to be in appellee's building, where the accident occurred, is conceded and that he was there not as a mere licensee, but by invitation, law will imply from the relations of the parties and the mutual benefit to be derived from the inspection."

We submit that the rationale of the *Dashields* case and the cases that follow supporting the Mutual Benefit Doctrine are controlling here. It is undisputed that Ralph Smith was on the premises of the appellee in the performance of his official inspection duties. Further, it is clear that a restaurateur reaps benefits from these inspections, without which the restaurant could not obtain or retain the necessary license to enable it to operate in the District of Columbia. The inspection service is essential to the continuity and hopefully, to the profitable operation of restaurateur's business. Moreover, the technical and educational assistance rendered by qualified inspectors undeniably influences and assists the restaurant owner in the maintenance and operation

of a clean, attractive, and resultingly popular and profitable establishment. The testimony of Mr. Smith and of his supervisor, Mr. Joseph Sterling supported that the Health Inspection Service rendered many beneficial services to the restaurateur, and likewise insured safe public eating places.

Thus, the requisite conditions for the utilization of this doctrine are present: Ralph Smith was a duly appointed, qualified inspector; he was lawfully upon appellee's premises, performing within the scope of his duty; as a result of the inspection both the public, as represented by Mr. Smith, and the restaurateur, derive obvious benefits from the inspection.

Further supportive of appellant's position is *Benea v. Swift and Company*, 66 S.W. 2d 172. In this case, a meat inspector was held to be an invitee on the theory that without inspections live animals could not be slaughtered and with inspections meat products would be more desirable to purchase. *Benea* is quoted with approval in *Howland, Inc. v. Morris*, 196 So. 472, 128 ALR 1013, where it was held that a building inspector occupied the status of an invitee:

"Taking the circumstances as a whole, we must conclude that Morris (inspector) was a business invitee on the premises and the rules of protection from injury applicable to invitees are controlling."

In a case similar to the one before the Court now, it was held that a tenement house inspector was an invitee while in the performance of his duties for the reason that the defendant owned and leased property subject to laws requiring inspection by public officials. *Frye v. Brubaker*, 29 Penn. Dist. R 893. Certainly, the same reasoning is applicable here.

Schwartzman v. Lloyd, 65 App. D.C. 216, is an early case which indicates which class of persons are considered invitees:

"When one 'expressly or by implication invites others to come upon his premises, whether for business, or for *any other purpose*, it is his duty to be reasonably sure he is not inviting them into danger, and to end he must exercise ordinary care and prudence to render the premises reasonably safe for the visit.' 3 *Cooley on Torts*, 4th edition 440." (Emphasis supplied)

In the light of the foregoing cases it is apparent that under the law in this jurisdiction the appellant Ralph Smith, was indeed an invitee, at the time he sustained his injury, and the Court should have so instructed the jury and granted Plaintiff's instruction.

In further support of this general proposition is *Jennings v. Industrial Paper Stock Co.*, 248 S.W.2d 43. At page 46, the Court held: Court held:

"As earlier stated, generally governmental inspectors are held to occupy the status of invitees. The basis for the holding as stated in almost all the cases is that the services rendered are beneficial to the defendant as well as to the public; that there is a mutuality of interest."

The local case of *Arthur v. Standard Engineering Co.*, 89 U.S. App. D.C. 399, is highly pertinent here, in view of the uncontradicted evidence as to the status of plaintiff at time of his injury. All of the evidence clearly established that plaintiff below was performing official duties as a health inspector when injured. There was no dispute on this point at any state of the proceedings. On the basis of the law in *Arthur v. Standard Engineering Co.*, *supra*, the lower Court was obliged to grant appellants' request for an instruction to the effect that appellant Smith was an invitee at the time of the occurrence in question, and prejudicial error was committed in leaving the question to the jury. This Court has ruled it was not a matter which should have been left to the jury for its determination. As stated in the *Arthur* case, *supra*:

"But here the facts essential to the determination of Appellant's status are not in dispute and whether they showed him to have been a licensee or an invitee was a legal question for the Court."

Finally, we invite the Court's attention to *Bennett v. Railroad Company*, 106 U.S. 577, in which the Supreme Court stated:

"It is sometimes difficult to determine whether the circumstances make a case of invitee in a technical sense of that word as used in a large number of adjudged cases or only a case of mere license.

"The principal, says Mr. Campbell, in his Treatise on Negligence, 'appears to be that invitation is inferred where there is a common interest with mutual advantage while a license is inferred where the object is the mere pleasure or benefit of the person using it.' "

It is basic that there is a greater duty owed to an invitee. In *Arthur v. Standard Engineering*, supra., at page 401, the Court stated:

"It is well settled that an inviter owes his invitee the duty of furnishing him with reasonably safe premises or appliances and will be held liable for injuries caused by a negligent failure to perform the duty. *Schwartzman v. Lloyd*, 65 D.C. App. 216, 82 F.2d 822, (1936); *Hellyer v. Sears Roebuck & Co.*, 62 App. D.C. 318, 67 F.2d 584 (1933); *Bell v. Central National Bank*, 25 App. D.C. 280, (1907). It is equally well established that a licensor is not liable in damages for the injuries of a mere licensee, unless the injuries were the result of the licensor's active negligence. *Radio Cab v. Houser*, 76 U.S. App. D.C. 35, 128 F.2d, 604; (1942); *Branan v. Wimsatt*, 54 App. D.C. 374, 298 F. 833, cert. denied 265 U.S. 591, 44 S.Ct. 639, 68 L.Ed. 1195, (1924); *Brauner v. Leutz*, 293 Ky. 406, 169 S.W. 2d 4, (1943).

From the case law which has developed in this jurisdiction, and indeed, throughout the land, and from the distillation of that law as set forth in the Restatement, it would appear that the Court unquestionably erred in declining to grant Plaintiff's request for an instruction that the plaintiff was in the status of an invitee, and entitled to the safeguards afforded an invitee. It is clear that the Court disregarded the prevailing law as set forth in *Arthur v. Standard Engineering, supra*, since in light of the uncontradicted evidence respecting the status of the plaintiff as a health inspector acting within the scope of his duties, the matter was one of law for the Court and not one of fact for the jury, and it was accordingly error in submitting this matter to the jury. As the cases reflect the duty owed a licensee is vastly less than that due an invitee, and accordingly it was highly adverse to the interests of the plaintiff to permit this uncontradicted evidence to be decided by a jury. All of the foregoing constitute prejudicial error, which it is respectfully submitted justify and indeed, compel reversal.

ARGUMENT II

THE COURT COMMITTED PREJUDICIAL ERROR IN THAT AFTER ADVISING ALL COUNSEL THAT THE ISSUE OF WHETHER PLAINTIFF WAS AN INVITEE OR A LICENSEE WOULD BE SUBMITTED TO THE JURY, AND AFTER DENYING PLAINTIFF'S REQUESTED INSTRUCTION THAT PLAINTIFF WAS AN INVITEE, THE COURT PROCEEDED TO INSTRUCT THE JURY THAT THE PLAINTIFF WAS IN FACT AN INVITEE, TOGETHER WITH THE DEFINITION OF AND DUTIES TOWARD AN INVITEE; THE COURT THEN INSTRUCTED THE JURY REGARDING THE DEFINITION OF AND DUTIES TOWARD A LICENSEE; THEREAFTER, THE COURT RETRACTED THE INSTRUCTION THAT PLAINTIFF WAS IN THE STATUS OF AN INVITEE, ALL OF WHICH COMBINED TO TOTALLY CONFUSE THE JURY ON THIS ISSUE TO THE GREAT PREJUDICE OF THE PLAINTIFF.

In its opening instructions to the Jury, the Court said:

"Ladies and gentlemen of the Jury, it now becomes my duty to instruct the Jury on the law that applies in this particular case, and it is your duty as jurors to follow the law as it shall be stated to you."

There can be no doubt as to the accuracy of this admonition, yet what followed insofar as certain most material issues are concerned, of necessity created such confusion in the minds of the jury, as to render the jury unable to clearly understand what issues were before it for consideration.

It will be recalled that prior to instructing the jury, the Court had denied plaintiff's Instruction No. 1 (App. 2) which was intended to instruct the jury that the plaintiff Health Inspector was engaged in performing his official duties at the time of his fall on the premises of the defendant. Of this there could be no doubt, since the evidence on this point was uncontradicted. The instruction further sought to instruct the jury that as a health inspector in the performance of his duties, the

plaintiff was in the status of an invitee. Although at first, the Court indicated it would so instruct the Jury, prior to arguments by counsel to the jury, the Court denied the requested instruction, and advised that the Court would submit the issue for decision by the jury as to whether the plaintiff was an invitee or a licensee.

Having been so advised, counsel for both plaintiff and defendant, expended substantial amounts of the time allotted for argument to the jury on this critical point, each seeking to convince the jury as to the reasonableness of his view that the plaintiff was or was not an invitee.

Yet when argument was concluded, the Court proceeded without hesitation to confound counsel by instructing the Jury that the plaintiff was an invitee, and that this could not have been a mere slip of the tongue is proven by the fact, that after so instructing the jury, the Court went on to give the standard instruction respecting definition of and duty toward an invitee: following this, the Court then continued on with its charge and gave the standard instruction regarding definition of and duty toward a licensee; shortly thereafter, the Court then advised the jury that it was retracting its instruction that the plaintiff was an invitee, and that the jury should make this determination.

The total thrust of this chronology of instruction and counter-instruction was two-fold; firstly it served to confuse the jury on the issue, and secondly, since juries are generally sensitive to the expressions of the trial judge, particularly during the Court's instructions, the affirmative act of the Court in advising the Jury that

“...the Court will retract the statement made to you that the Court by law states that the plaintiff is an invitee.” (App. 16)

was unquestionably prejudicial to the plaintiff below in that by inference, this jury, which happened to be a new jury, undoubtedly was puzzled, confused and led to believe that the Court was for

some reason by word and inference, letting it know that the plaintiff was not in fact an invitee.

At the very least, then, taken as a whole, on this very important point, the Court's instructions were less than clear and in fairness to the plaintiff below denied him a clear cut issue before the jury, free of judicial inference or innuendo, which regrettably was a result of confusing and conflicting instructions by the Court.

In the light that such lack of clarity and confusion existed, certainly this Court should make available to the appellant an opportunity for review of this major issue. The appellant sustained injuries of a major nature, which compelled his retirement. Certainly, if there be any doubt that the instructions were clear and understandable, and that such lack of clarity, rendered it difficult for the jury to perform its function, then this cause should be reversed and the appellant granted a new trial.

ARGUMENT III

THE COURT ERRED IN EXTEMPORANEOUSLY INSTRUCTING THE JURY THAT PROOF OF NOTICE IS REQUIRED IN THE PRESENCE OF AN UNSAFE OR HAZARDOUS CONDITION ON THE PREMISES WHERE THE EVIDENCE REVEALED THAT SUCH UNSAFE FOREIGN SUBSTANCE WAS DUE TO ACT OR OMISSION OF THE DEFENDANT'S AGENTS OR EMPLOYEES.

In the case at bar, the plaintiff below charged and testified that his fall was due to a hazardous condition of the metal stairs leading down to the barbecue kitchen, located in the basement of a building adjacent to the defendant's main restaurant building, and in which latter building the dining room and serving kitchen were located. The

plaintiff, and thereafter his supervisor, testified that the stairs upon which plaintiff fell were smoothly worn on the edges and slippery, that there was evidence of spilled grease on the stairs at the point where plaintiff was caused to slip, and that there was a greasy film on other stairs as well; that in addition, the stairs were wet, and there was evidence of a garden hose draped across the lower half of this lengthy set of stairs. There was testimony that the spare ribs were barbecued in the basement kitchen, brought up the stairs by employees of the defendant, and transported across the areaway into the main restaurant building. The fact that the barbecue pits were of immense size, six feet wide and twelve feet deep, testified to the obviously large quantities of spare ribs which were barbecued in this basement kitchen and brought up the stairs to the main building for storage and service. That these cooked pork products prepared in large quantities would leave a trail of grease upon the stairs was a reasonable inference from the facts established by the record.

Further the testimony that these metal stairs were smoothly worn, particularly on the edges, was indicative of long years of constant usage and exposure, and that wetness covered the grease was also clearly established.

On the basis of the foregoing, the Court's decision to grant an extemporaneous instruction (App. 20) requiring the jury to find that the defendant had sufficient time to ascertain that condition, was an erroneous instruction. Not alone was it hazardous to grant such an instruction upon request of counsel made at the bench, but to do so extemporaneously without including all appropriate elements to safeguard the same was both hazardous and erroneous.

When counsel for the plaintiff asked for a supplement to the instruction, the Court blithely retorted:

"It's not going to be decided on that anyway. It is a question of how much you are going to get." (App. 20).

Certainly, it is apparent from the comment of trial Court that it did not take seriously the objection of plaintiff's counsel, nor for that matter, did it carefully consider the content and wording of its extemporaneous instruction on the issue of notice respecting the grease upon the stairs.

In addition, the presence of slippery grease on the stairs, under all reasonable inferences, was attributable to the defendant, through its employees, in daily transporting large quantities of cooked sauced ribs up the stairs. The fact that sealed cartons of raw meat were brought down to the basement kitchen did not entitle the defendant to an instruction on the issue of notice since there was no evidence whatever submitted by the defendant to explain the presence of spilled grease on the stairs.

Every reasonable inference deducible from the evidence was that the grease was due to the transportation of greasy cooked ribs between the basement kitchen and the dining room. Removed as they were from public use, the Court committed highly prejudicial error in granting an extemporaneous charge on the issue of notice. The cases are abundant and clear that notice is not an element which need be proven when the negligence charged is that of the defendant. By no stretch of the imagination could the presence of spilled grease on the step where plaintiff fell, and on the other stairs as well, be inferred from delivery of sealed cartons of raw meat. Certainly, the foregoing constitutes additional basis for reversal of this cause and remand for new trial.

CONCLUSION

It is respectfully submitted that the instances of error hereinbefore set forth, committed by the trial court, both individually and collectively were prejudicial and justify this Honorable Court in ordering a reversal in the case at bar.

The law is established beyond question that an inspector in the performance of his duties, which work to the mutual benefit of the public and the establishment inspected, is entitled to the protection which is afforded a business invitee. The validity of such reasoning is not subject to question. It is both in the public interest that businesses who sell for public purchase products which may be sold under conditions which could be injurious to health should be subject to reasonable inspections. It is likewise in the interest of such businesses to submit to inspections, since such businesses are usually licensed, and their continuity through re-issuance of licenses is dependent upon compliance with regulations which govern them. Thus, the public is served, and the establishment is likewise equally benefitted. Under these circumstances, the Court was guilty of reversible error confusing the jury with paradoxical instructions, and in ultimately leaving to the determination of the jury an uncontradicted fact, which by clear precedent, the Court was bound to rule on as a matter of law.

For all the reasons set out in this Brief, it is respectfully submitted that this case should be reversed, and remanded for new trial.

Respectfully submitted,

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Morris Altman
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Attorney for Appellants.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RALPH D. SMITH, et al,

Plaintiffs

v.

Civil Action No.
1499-67

ARBAUGH'S RESTAURANT, INC.,

Defendant.

DOCKET ENTRIES

1969

May 5, 6, 7, 8 - Trial; Jury retires May 8.

May 9 - Verdict for Defendant

May 19 - Motion for a new trial

June 9 - Opposition to Motion for a new trial.

Oct. 20 - Motion for new trial denied. Leonard P. Walsh, J.

Oct. 28 - Notice of Appeal filed from Judgment of Court
entered on 20th of October, 1969.

Nov. 5 - Amended Notice of Appeal from judgment of Court
entered May 9, 1969 and from Order denying Motion for new trial
entered Oct. 20, 1969.

EXCERPT FROM PRETRIAL STATEMENT

STIPULATION:

Some time around noon on March 4, 1966, the Pltff. Ralph D. Smith was on the premises at 2606 Conn. Ave., N.W. Washington, D.C. which premises were leased by the Def. While descending a set of stairs leading to the cooking area, the plaintiff fell.

* * *

PLAINTIFFS' INSTRUCTION NO. 1

The jury is instructed that the plaintiff Ralph Smith in his capacity as a District of Columbia Health Inspector was an invitee upon the premises of the defendant Arbaugh's Restaurant, Inc. on March 4, 1966.

The jury is further instructed that the defendant Arbaugh's Restaurant, Inc. owed a duty to maintain its premises including entranceways and stairways in a reasonably safe condition for invitees coming upon the premises.

[Excerpts From Transcript of Proceedings]

[2]

RALPH D. SMITH

* * *

DIRECT EXAMINATION

BY MR. GOLDBERG:

Q. *** Will you please state your full name and your address?

A. Ralph D. Smith. 1811 Peabody Drive, Falls Church, Virginia.

* * *

Q. Mr. Smith, you were at one time with the District [3] of Columbia Health Department? A. Yes.

App. 3

Q. When did you first go to work there? A. I went to work in March of 1945.

Q. And when were you retired? A. I was retired November 4, 1967.

Q. During that period of time to which bureau were you assigned? A. Bureau of Food and Drug, D. C. Health Department.

Q. During those years commencing with 1945, to what type of work were you assigned as a Health Inspector? A. I was assigned to the Inspection Division. It was pertaining to inspecting food establishments throughout the city.

Q. As a Food Inspector for the Health Department what did your duties consist of? A. It consisted of inspecting the premises in regards to cleanliness and seeing that the equipment was properly maintained and working properly and pertaining to ventilation problems, air conditioning and heating and so forth.

* * *

[4] Q. We are inquiring today with regard to an occurrence at the Arbaugh's Restaurant March 4, 1966. Do you recall such an occurrence? A. Yes.

* * *

[5] Q. On March 4, 1966 did you have the occasion to go to the premises of Arbaugh's Restaurant, which fronts on 2606 Connecticut Avenue? A. Yes, I did.

Q. How did you happen to go there on that particular day? A. I received this assignment from the office, from my supervisor that particular morning.

[6] Q. Who was your supervisor? A. Mr. Sterling.

Q. All right, sir. A. He sent me there in regards to the fire that they had several weeks before.

These barbecue pits were located in the basement of the building in the rear of the main restaurant.

Q. What was your purpose in going there on March 4, 1966?

A. Well, to see if the barbecue pits or the furnace pits had been properly repaired after the fire.

Q. Was Arbaugh's Restaurant a licensed restaurant in the District of Columbia at that time? A. Yes, it was.

Q. Had it been there for some time? A. Yes.

Q. And you were making this inspection as part of your official duties? A. Yes.

* * *

[7] Q. And in approaching the kitchen area where the pits are located what route did you take after parking your car? A. Well, there is an archway there on the side of the building and I go through the archway and I get to the head of the stairway, to the building where the barbecue pits are located.

Q. In order to go to the kitchen area where the pits are located are you obliged to go through the main building? A. No, we are not.

* * *

[8] Q. Then you approach the stairs leading down to the basement? A. Yes.

Q. Can you describe the set of stairs which you were going to take going down to the basement on that particular day? A. Well, the stairs are metal and I think there is about 20 steps and it goes straight down to the landing going into the kitchen where the barbecue pits are located. They have a hand rail on the lefthand side. There is no cover over the steps.

Q. Did you then proceed to descend the stairs? A. Yes, I did.

Q. As you proceeded down the stairs did you notice anything on the stairs? A. There was a hose about halfway down the stairway stretched across.

Q. There was what? A. A hose, a rubber hose.

App. 5

Q. And do you know from whence this hose came? I mean was it connected or disconnected? A. It was connected to the adjacent wall that leads into the main restaurant, the spigots on that wall, and then stretched across the areaway going down into the stairway that goes to the other building.

[9] Q. Can you tell us at what level on the stairs the hose was located as you observed it? A. Well, it was about halfway down and it appeared to me, when the hose was being pulled down, there were several kinks in it and of course that was sticking up above the steps.

* * *

Q. Did you go down the stairs? A. Yes, I started down the stairs.

Q. Tell us the manner in which you descended. A. I was holding onto the railing and got about halfway down. I went to take another step and my left foot skidded out from under me and I fell backwards, of course breaking my hold from the handrail and then I fell down on my back and skidded all the way to the bottom of the stairway.

Q. How close were you to the hose on the stairway at the time that your foot skidded out from under you? A. Well, I imagine I was about two steps from that, above the hose.

Q. And when your foot skidded out from under you and [10] you fell backwards did you at any time thereafter make contact with the hose? A. I skidded into the hose as I fell down and of course when I got to the bottom of the stairway I was still entangled with the rest of the hose, my legs were.

* * *

[11] Q. Did any particular employee see this occurrence or come to your assistance. A. Well, the cook was inside where the barbecue pits are and he came out the door when I imagine he heard me fall. I hollered when I fell.

Q. And do you know his name? A. His name is James Lane.

Q. When he came out did he assist you? A. He offered to help me up but I told him to wait a minute because I didn't know the extent of my injury. So then he took a hold of my arm and helped me up and helped me up the stairway.

Q. As you ascended the stairs did you have an occasion to observe the stairs? [12] A. Well, as I went back up the stairway I said to James Lane, I want to see where I fell.

So, I did look down where I fell and there was evidence of wetness and it was greasy there.

Q. What did you see as far as grease is concerned? A. Well, just the grease spilled on the stairway is all I saw and of course with the water.

Q. Was this at the point where you fell? A. Yes.

* * *

Q. Insofar as the stairs themselves were concerned at the time you started down the stairs can you tell us their condition as far as wetness or dryness is concerned? A. Well, the stairway was wet. Of course, the front ledge of the stairway was worn right on the edge—

* * *

Q. With respect to the particular stair approximately at which you fell, can you tell us the condition of those stairs? [13] A. Well, it was wet and the edge of the step was rounded off from continuous wear.

Q. Was there any corrugation? A. Several places it was broken, yes.

Q. I am referring to the edges. Were the edges smooth or were the edges— A. They were smooth, like they had been worn.

Q. You said that the stairs were wet. Were the sidewalks and streets in this area wet at that time of day? A. No, there wasn't any water there at all, just on the stairway.

* * *

Q. After you got up the steps where did you go? A. I went into the rear door of the restaurant, the main part of the restaurant, through the kitchen and out to the front bar. There is a telephone on the wall, so I hobbled over there and I called the office and told them what happened. Then James Lane called the ambulance and they came [14] and picked me up.

* * *

[27] Q. Did there come a time that Dr. Holtzman examined you in connection with an application for disability retirement in the latter part of 1967? A. Yes, he did.

Q. As a result of his examination and its submission to Civil Service were you approved for disability retirement? A. Yes, I was.

* * *

[38] Q. Had you previously been in the kitchen where you were headed for at the time of this fall? A. Not on this date.

* * *

Q. What was located down in that room? A. In that room was two barbecue pits, gas fired, where they did the barbecuing.

Q. Was there anything else located down there in the way of kitchen equipment? [39] A. No.

Q. Was all the cooking for the restaurant done in this area? A. No, just the barbecue.

Q. Can you give us an idea of the size of the pits downstairs? A. I imagine about six feet wide and twelve feet deep.

* * *

Q. Do I understand that the base on which the ribs are cooked is about six feet wide and twelve feet deep? A. Yes.

Q. And there were two such pits down there? A. Yes.

Q. Was there kitchen equipment of any kind down there? A. There was a work table and there was a machine that made cole slaw and also french fried potatoes, but the rest of the equipment was in the other kitchen.

Q. Where was the storage—the refrigeration equipment located?

A. That was in the main kitchen.

* * *

[40]

JOSEPH H. STERLING

called as a witness by Plaintiff, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. GOLDBERG:

Q. Will you please state your name and your professional assignment? A. Joseph H. Sterling. Area Supervisor, Department of Public Health, Bureau of Food and Drug.

[41] Q. Mr. Sterling, as an Area Supervisor what are your main duties? A. To see that the establishments are routinely inspected, to see that all complaints are handled properly, make assignments of personnel, inspectors.

Q. Do you have a number of inspectors under your supervision?

A. Five at the present time.

Q. And back in 1966 did you have a number of inspectors under your supervision? A. Yes, sir, six at that time.

* * *

Q. These inspectors who work for you and under you, what types of establishments do they inspect? A. Any establishment pertaining to food operation, food handling, selling of food, restaurants primarily, hotels.

* * *

Q. The inspectors who work under you and who work for the Health Department, are they also engaged in examining for issuance of licenses? A. On new establishments, yes, sir.

Q. Insofar as the individual inspectors are concerned, [42] what is their main function in going to restaurants? A. For sanitation. In most instances it would be the food preparation areas to be inspected. Emphasis is put on this particular phase of the operation.

Q. Do your inspectors assist new locations in setting up operation and advising and assisting them? A. Yes, sir. They submit a plan for a new establishment and we see the equipment is being installed as per approved plan.

Q. In addition to inspecting the place for purposes of determining compliance you also assist them in proper and good operating facilities? A. Yes.

* * *

[44] Q. Mr. Sterling, my inquiry possibly wasn't clearly stated. My inquiry was with respect to the duties of an [45] inspector in regard to restaurants. Is this simply for observation and enforcement of regulations or do you in the course—do inspectors in the course of their routine duties render assistance to the operators in the conduct and the maintenance of their establishment?

* * *

A. In the course of the inspection, in order to bring about full compliance, an inspector makes suggestions as to equipment and one thing and another, rearranging of equipment so that compliance could be better obtained and more easily obtained.

Q. Do you maintain any classes for the instruction of restaurant people? A. Not at this time, no, sir.

* * *

Q. Have you in the past? A. Yes, sir.

* * *

[46] Q. Do you recall an incident involving Mr. Smith on March 4, 1966? A. Yes, sir.

Q. Were you the supervisory inspector at the office at which he was assigned on that date? A. Yes, sir.

Q. How long had he been under your supervision as of March 4, 1966? A. Approximately two years. We switch occasionally and he had been reassigned to me about two years prior to this incident.

Q. Had you been acquainted with him in the years before he came under your direct assignment? A. Oh, yes, sir.

[47] Q. And for what number of years would you say you had been aware or acquainted with him at the Department of Health, Bureau of Food Inspection? A. A good 20 years.

Q. On March 4 did you give him any particular assignment? A. Yes, sir, he had restaurants to inspect and he was to check the fire at Arbaugh's. They had some smoke damage that was to be repainted and this sort of thing.

Q. Do you recall approximately how long prior to March 4, '66 this fire had occurred? A. Several weeks.

Q. This is the Arbaugh's Restaurant at 2606 Connecticut Avenue? A. Yes, sir.

Q. Are you acquainted with that particular restaurant? A. Yes, sir.

Q. On March 4, '66 did you assign him to make an inspection there? A. Yes, sir.

Q. What work was to be done following this fire that you told us about? A. General cleaning and repainting, light reflectors and this sort of thing.

Q. In what portion of the premises had the fire occurred? A. [48] This would be in the basement of a building in the rear of the restaurant proper, across an area-way and down the steps.

Q. What facilities were maintained by Arbaugh's in this particular area? A. This was storage, food storage, cabbage and this sort of thing for the cole slaw, the barbecue pits for the barbecues, ribs, toilet facilities, hand washing facilities.

Q. How was access to that particular portion of the restaurant obtained? A. From the restaurant kitchen it would be down, I believe, three steps from the restaurant proper, across an area-way and down maybe 12, 15 steps to the basement.

* * *

[51] Q. At Arbaugh's did you do anything except go and get the car? A. I checked the steps, looked at the steps.

Q. And which steps were they that you checked? A. Pardon?

Q. Which stairs did you check? A. The stairs going to the basement, to the barbecue area.

* * *

[52] Q. Did you observe the steps halfway down? A. Yes, sir.

Q. And can you tell us what you observed insofar as those steps were concerned? A. All the steps were pretty badly worn, extremely smooth on the edges.

* * *

[53] Q. By the way, Mr. Sterling, aside from the smoothness of the steps at the center did you notice any other condition existing on those stairs at the center of the stairs?

* * *

A. I didn't go all the way down the stairs, but the top stairs had a light coating of grease and dust and so on on them, very light.

Q. Did you observe the condition of the stairs at the center of the steps, halfway down? A. I would say they were all very much the same, no difference in any of them, actually.

* * *

[302] [3:05 P.M.]

MR. GOLDBERG: Your Honor, may we approach the Bench for a moment?

THE COURT: Certainly.

MR. GOLDBERG: Your Honor, I did wish, if I might, to note an exception to the denial of my instruction No. 1, which I did submit. That was an instruction in which I requested the Court to advise the Jury that the plaintiff was in the status of an invitee. In view of the fact that the Court is leaving this decision as to whether he was an invitee or licensee to the Jury, I would like to note an exception to the denial.

THE COURT: It will be denied.

THE COURT: Yes.

[IN OPEN COURT]

COURT'S INSTRUCTIONS TO THE JURY

THE COURT: Ladies and gentlemen of the Jury, the caption of this case as you perhaps already know is Ralph D. Smith and Thelma, Smith, that is, man and wife, and they are represented by Mr. Goldberg. And, it is Arbaugh's Restaurant is the defendant, and represented by Mr. Donahue.

Ladies and gentlemen of the Jury, it now becomes my duty to instruct the Jury on the law that applies in this [304] particular case, and it is your duty as jurors to follow the law as it shall be stated to you.

If, in these instructions, there is repetition or an idea is stated in varying ways, no emphasis thereon is intended by the Court, and you must take the instructions in its entirety. In other words, don't single out any particular portion of the instructions.

For that reason, as I say, you are not to single out any certain sentence or any individual point that is contained in the instructions. You are to consider all of the instructions as a whole, that is, in its entirety, and not to regard each, that is, you consider it in its entirety.

The Court will attempt to instruct you slowly and deliberately because I know that you are a new jury, so that you may have a better opportunity of understanding the law that applies in this particular case. It is extremely important in deciding this case that you be fair. You are under a strict oath as jurors just as the court is under a strict oath. You must weigh and consider this case without regard to [305] sympathy, to prejudice, or bias for or against either party to the action. On your oath as jurors, you must decide the case solely upon the evidence which has been submitted from the witness stand, and from the

reasonable inferences that you may deduce or deduct from the evidence which has been submitted to you.

The easiest way, ladies and gentlemen of the Jury, to advise you that, remember, if you were down here as a party litigant, that is, yourself, you would want some jury to be fair, not to decide the case on sympathy, or without bias, or without prejudice.

Now, the Court has already told you that you are the sole judges of all of the questions of fact.

In other words, you must determine what the facts in this case are. The Court has the right to comment on facts. I do not comment on the facts because you are an intelligent jury, you have listened with attention, and the Court feels that it is solely within your jurisdiction or your discretion.

In other words, putting it another way, ladies and gentlemen of the Jury, we both have respective functions. You, as jurors, determine the questions of fact. The Court determines the questions of law. You must determine for yourselves what the facts are from the evidence presented from the witness stand, which you have listened to, without regard to [306] the opinion of counsel and most certainly, if expressed by word or by deed without respect to the Court.

The Court has ruled that Mr. Smith was an invitee, and an invitee is a person who goes upon the property of another for the purpose of carrying on some transaction either for the [316] benefit of himself and the owner of the property in question.

Now, toward the invitee, the owner or occupier of the property in question is obliged to exercise ordinary care, to keep the premises in reasonable condition, that is, in reasonably safe condition for the invitee, and to refrain from any active negligence in making the property safe.

However, the responsibility with respect to the condition of the premises is not absolute. It is not that of an insurer.

If there is a danger attending upon the premises, or upon the work which the invitee is to do on the premises in question, and if such danger arises from the condition not readily apparent or not readily available to be seen, to the senses, and if the owner or the occupier has any actual knowledge of the harm or if the condition that is existing, then in the exercise of ordinary care it then becomes the duty to give reasonable warning of such danger to the invitee.

On the other hand, the owner or the occupant is not bound to discover any defects which a reasonable inspection would not disclose, and he is entitled to assume that the invitee will provide or use, see the danger which would be available to be seen by sight or the senses, meaning all of the senses of the body. And he then uses ordinary care. That is the rule of law that the owner of the premises uses ordinary care only.

[317] The invitee, on the other hand, has a right to assume that the premises that he is invited to enter are reasonably safe for the purpose for which the invitation is extended.

Now, ladies and gentlemen of the Jury, the Court instructs you also on a licensee. And a licensee is a person on the property, that is, the premises of another not by invitation or permission but rather by perseverance.

He is there by himself with no particular invitation and the risk so far as the licensee is concerned is the danger which one couldn't without notice could not be deducted. In other words, that by the senses, sight, and such, could not be readily ascertained. Stated in another way, that if a person owned property that had danger, a staircase for instance that would not be readily seen, that there would be a responsibility to advise the licensee of that particular condition.

The Court, ladies and gentlemen, would like to clarify for you one point that it has made to you. The Court, a few moments ago, instructed you that the plaintiff in this case was an invitee.

The question of whether he is an invitee or a licensee is entirely within your discretion.

So that, the Court will retract the statement made to you that the Court by law states that the plaintiff is an invitee. It is for you to determine under all of the facts and [318] all of the circumstances whether he is an invitee or a licensee.

Now, whether a person entering the premises of another bears the legal status of an invitee, whether he is a guest or licensee, is decided upon the principle of the visit which is being made. Even though he has been invited as a guest, he is not necessarily an invitee. When, however, the visitor has a purpose, that is, related in this particular case, to the restaurant in question, then an invitation to use the premises may be inferred, and whether so inferred or expressed, the invitation and the purpose make the person an invitee.

You, the jury, must determine in this case whether the plaintiff was a licensee or an invitee, as the Court has already told you; and apply the proper standard of care regarding a person who is using the premises in question.

[4:20 P.M.] AT THE BENCH

MR. GOLDBERG: Your Honor, I would like to renew my objection to the Court's refusal to give Plaintiff's Requested Instruction No. 1; more specifically, I would like to in addition, renew my objection to the Court sending this case to the Jury on the issue of fact as to whether the Plaintiff Ralph Smith was an invitee or a licensee.

The Plaintiff respectfully submits that as an inspector going upon the premises on the business of the [323] defendant, his status is as a matter of law that of an invitee, and that the plaintiff was entitled to such instruction.

THE COURT: All right, that will be denied.

AT THE BENCH

THE COURT: All right. Anything else?

MR. GOLDBERG: I don't believe so, Your Honor.

THE COURT: All right.

MR. DONAHUE: On behalf of the defendant, Your Honor, I would like to suggest that as to the definition and duties under business invitee that you gave, that it also should be a little more specific, similar to that Safeway Stores versus Preston case. It is a standard instruction from the Revised D.C. Instructions, 134, as to the duty on the landlord or the owner or proprietor of the restaurant and store as to the foreign substance, as to actual or constructive knowledge. Would you like me to read that?

THE COURT: No, but I know the case, and I don't think it applies in this particular case because everybody saw the condition. Everybody saw the slippery, wet condition.

[325] MR. DONAHUE: I agree with that but I was referring to the grease that the plaintiff testified to was one of the causes. That would be the foreign substance.

THE COURT: But Mr. Lane testified the opposite, didn't he?

MR. DONAHUE: Yes, but if the jury does find that there is grease on that step I would think then they would have to be instructed under that Safeway Store case.

MR. GOLDBERG: Your Honor, may I be heard on that?

THE COURT: Yes.

MR. GOLDBERG: I strongly object to that instruction for the reason that this incident occurred in an area involving the kitchen which is trafficked only by employees and personnel who work for the corporation. Therefore,—

THE COURT: But that is what the case is talking about.

MR. GOLDBERG: I don't believe that applies, Your Honor, in a case which is not a publicway. As I recall the case, that he is speaking of. This is an area which is used by customers as well as personnel.

THE COURT: Yes.

MR. GOLDBERG: But here we don't have an area which involves customers. Here we have only a kitchen area which is trafficked by employees and I believe under those circumstances [326] the element of actual or constructive knowledge is not pertinent.

MR. DONAHUE: May I point one thing out before you make a decision? Mr. Goldberg, yesterday, I agreed up to yesterday, until he pointed out from Mr. Lane that Esskay or some other meat outfit came and made daily deliveries of the spare ribs, that he has a contention brought the grease there, so it is right within the Safeway case because he brought in other people.

THE COURT: I am going to grant it.

MR. GOLDBERG: In sealed cartons. Those spareribs were delivered only in sealed cartons.

THE COURT: I am going to grant it.

MR. GOLDBERG: Exception to it.

THE COURT: Ladies and gentlemen of the Jury, the Court has already told you that it will not comment on testimony that has been submitted to you. The Court, however, does instruct you that if there was a foreign substance, if you should find that there was a foreign substance on the staircase in question, then and in that event, I believe it was referred to as grease, then and in that event, you must find that the person in charge, Mr. Lane, or the owner, someone in charge, had sufficient time to ascertain that condition."

* * * *

THE COURT: "It is not going to be decided on that anyway. It is a question of how much you are going to get." (App. 20)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,748

RALPH D. SMITH and THELMA SMITH,
Appellants,

v.

ARBAUGH'S RESTAURANT, INC.,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

APPELLEE'S BRIEF AND APPENDIX

United States Court of Appeals
for the District of Columbia Circuit

FILED OCT 12 1970

Nathan J. Paulson
CLERK

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Rockville, Maryland 20852
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APPELLEE'S BRIEF

COUNTER STATEMENT OF THE CASE

The defendant produced Mr. James Lane who was employed at the defendant's restaurant at the time of this incident and was present on the day of the accident. (TR 2). He testified that spare ribs are not brought up from the basement building where they are cooked until after 4:00 p.m. which would be four hours after the accident occurred. (App. 2) He further stated that Smith was there as an inspector for the District of Columbia to see that such

kitchen was clean. (App. 3) He said the spare ribs were delivered by employees of Swift & Co. and are taken into the basement by such employees by wheeling a hand truck down the steps or by being carried by such employees and that there are two deliveries made a day. (App. 1-3)

ARGUMENT

I. THE COURT WAS PROPER IN DENYING APPELLANT'S INSTRUCTION NUMBER ONE AND INSTRUCTING THE JURY AS TO THE DUTY OF AN INVITEE AND THAT OF A LICENSEE.

It is clear that the law of the District of Columbia in determining whether an individual on another's property is an invitee or merely a licensee is the mutual benefit test as set forth in *Arthur v. Standard Engineers*, 89 U.S. Appeals D.C. 399, following the suggestion of the Supreme Court. This test is whether the owner of land received benefit or advantage from the permitted use by another. If the evidence does not meet such test, the user of land is a mere licensee and the fact that permission whether express or implied is given establishes no higher relation than that of a licensee.

"*the invitee must go upon and appropriate the premises or the facilities of the invitor by and through which some benefit is received by the latter. In other words, the mission of the invitee should be for the mutual benefit of both parties."

"A permission, whether express or implied, is not an invitation to enter or use, and establishes no higher relation than that of mere licensor and licensee."

"We adopt, therefore, the mutual benefit test for determining whether the appellant was a licensee or an invitee, in preference." *Arthur v. Standard Engineers, supra.*

Smith in this instance testified that on *this occasion* as a District of Columbia health inspector he went on the premises of the defendant to inspect a cooking area that recently had had a fire, obviously for the purpose of seeing if there was a violation of the District of Columbia health laws.

As has been expressed by the above cited decision and also in *Youngmen's Shop v. Odend'Hall*, 73 Appeals D.C. 354 (1941) *if any doubt exists* whether the plaintiff is a licensee or invitee it becomes a question for the jury and not that of a matter of law by the Court. It was, therefore, proper in this instance based upon a contrariety of evidence that the Court allow the status of Smith to be determined based upon the facts by the jury. The restatement of torts as set forth by Smith in defining business invitee has never been adopted by the District of Columbia and would not be applicable as a matter of law where there is some controversial issue as to whether or not a benefit was to be received by a landlord on a *particular occasion*. The case of *Dashields v. Moses*, 35 App. D.C. 583 that Smith cites in support of his position has no application to our facts as in that instance the landlord by contract created as a matter of law a status of invitee as to an insurance inspector and it was obviously to the mutual benefit of all that the inspection be made so that a contract could be entered into by such parties. It must be brought to our attention at this time that the purpose of Smith as a health inspector making an inspection was not a condition precedent to the defendant obtaining a license but was to the benefit of the District of Columbia and to the public to see that said Arbaugh's Restaurant was meeting the requirements of the health laws of such jurisdiction. It would be impossible to say that such occasion as a *matter of law* benefited the Arbaugh's Restaurant, and therefore, the Court exercised its propriety in allowing the jury to determine such status as a matter of fact.

II. NO PREJUDICIAL ERROR WAS COMMITTED BY THE COURT IN ITS INSTRUCTION TO THE JURY THAT THE PLAINTIFF WAS IN FACT AN INVITEE AND THEREAFTER ADVISING THE JURY TO IGNORE THIS STATEMENT.

The Court in its original part of its instruction did state that Mr. Smith was an invitee upon the defendant's property at the time of this incident and then instructed the jury as to the definition and the duty of invitees and licensees under the law of the District of Columbia. Realizing its mistake, the Court then advised the jury that it was their decision to determine whether or not in this instance Smith was an invitee or licensee. (Appellant's App. 13-15). If such mistake can be construed as error it was such that favored the position contended by Smith's counsel and, therefore, could not be one that is construed to be prejudicial. It was clear to the jury as to their responsibility when the judge corrected his instruction as follows:

"The question of whether he is an invitee or a licensee is entirely within your discretion.

"So that, the Court will retract the statement made to you that the Court by law states that the plaintiff is an invitee. It is for you to determine under all of the facts and all of the circumstances whether he is an invitee or a licensee."

It is further to be noted that Appellant's Brief in his argument on this point at no place refers to the record that an exception was made by appellant to the effect that the Court had given instructions to the jury that "lacked clarity and created confusion" as he now argues. Having not raised this question at the time the instruction was given, it would seem that this Court would not consider it an appropriate error to review at the appellate level. See Federal Rules of Civil Procedure, Rule 51.

"No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects

and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

Palmer v. Hoffman (1943) 318 U.S. 109, 119, 63 S Ct. 477, "In fairness to the trial court and to the parties, objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error. Where a party might have obtained the correct charge by specifically calling the attention of the trial court to the error and where part of the charge was correct, he may not through a general exception obtain a new trial."

III. THE COURT WAS CORRECT IN INSTRUCTING THE JURY AS TO SHOWING THAT THE LANDLORD WAS ON NOTICE AS TO A DEFECTIVE CONDITION ON HIS PROPERTY.

One of Smith's contentions for the cause of his fall was that he noticed grease on the stair after he had fallen. (Appellant's App. 5 and 6). There was no direct testimony by the appellant as to how the grease had been caused to be placed on the step or for what period of time it had been caused to be placed on the step or for what period of time it had remained but there was circumstantial evidence that would favor both parties in this instance. The appellant introduced evidence that after the ribs were cooked and refrigerated in the basement, they were brought up the steps by employees of the restaurant. On cross-examination of Mr. Lane, appellant also introduced evidence that the ribs were carried down the basement steps by employees of Swift & Co.

Under the latter set of facts, the Court was correct in instructing the jury as to the duty of Arbaugh's. *Safeway Stores v. Preston*, 106 U.S. App. D.C. 114, 269 F.2d 781 (1959).

Respectfully submitted,

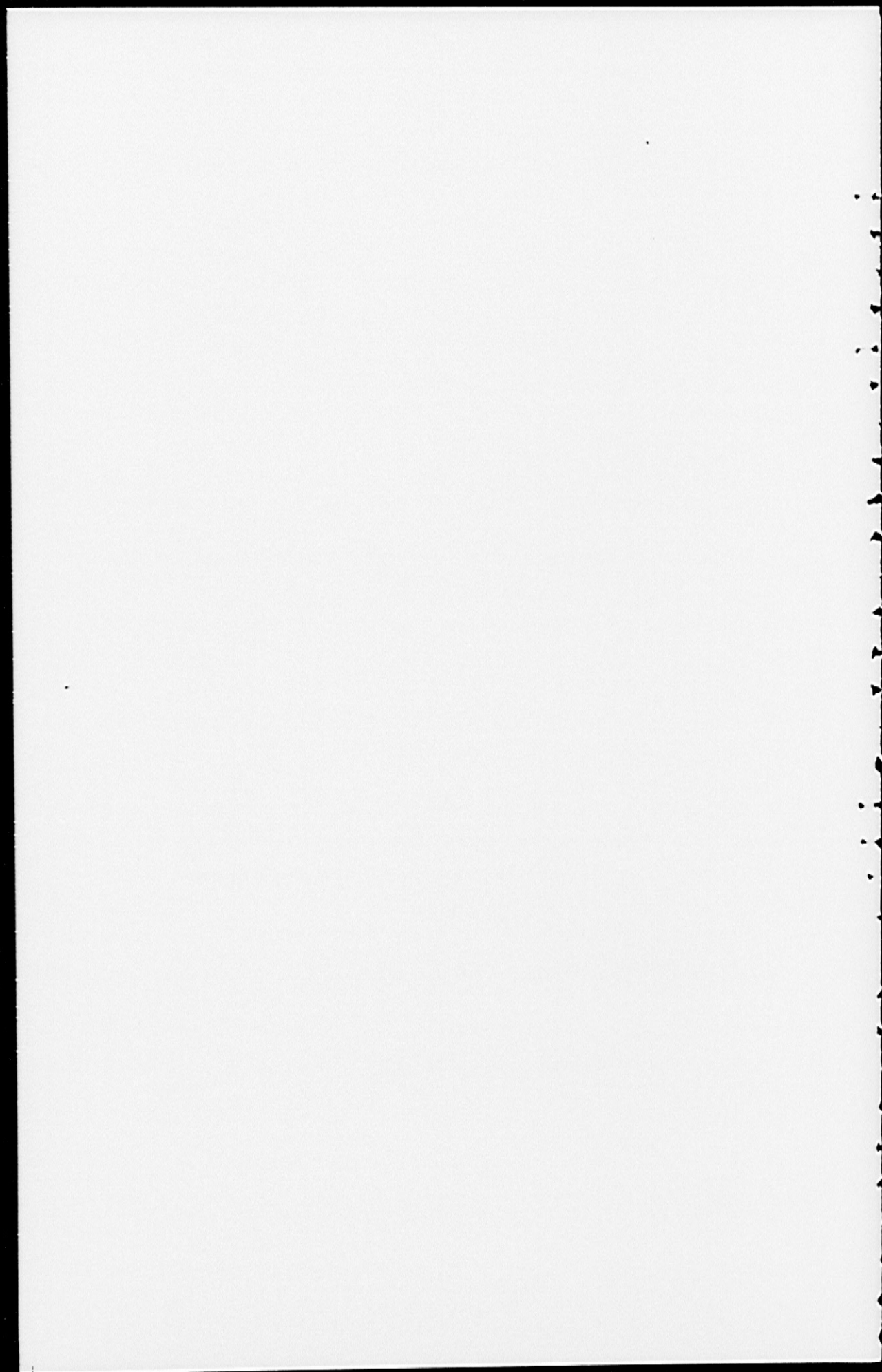
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(i)

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Excerpt of Testimony of James Lane:

Cross Examination 1



APPENDIX

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

RALPH D. SMITH, et al.

v.

ARBAUGH'S RESTAURANT, INC. Civil Action No. 1499-67

[a body corporate]

R. S. SHERIER, President

Defendant

May 7, 1969

Washington, D.C.

TRANSCRIPT OF PROCEEDINGS

[3] * * * *

Whereupon,

JAMES LANE

witness called by the defendant, having been duly sworn,
was examined and testified as follows:

* * * *

CROSS EXAMINATION

BY MR. GOLDBERG:

Q. Mr. Lane, you have indicated that you have been a
cook there for about 26 years? A. 26 years.

Q. Have you been the only cook who has operated in
the barbecue section of the restaurant during that time?

A. There was one man before me. When I went there.

* * * *

[5] Q. All right. Now, how are these ribs brought down-
stairs before they are cooked? A. Well, when they are
delivered they bring them down on a hand-truck.

Q. How often do the handtrucks bring them there? A.
Probably make twelve a day, make two trips.

Q. Two trips a day? A. Yes.

Q. You mean they put the boxes of ribs on these hand [6] carts and sort of bounce them down the stairs? A. That is right.

Q. Has that been the way they have always delivered them over the years? A. No, they usually carry them down.

Q. I beg pardon? A. Carry them down.

Q. Carry them down? A. Yes.

Q. How long have they been using hand carts to deliver them? A. A couple of years.

Q. Were they using them before this incident involving Mr. Smith? A. Well, it depends on whether they have a helper or not. If we have a helper they carry them. If we don't have a helper we use a hand truck.

Q. So there would have been hand trucks used in the past even before Mr. Smith had his accident? A. Sometimes.

* * * * *

Q. It would be or not be? [7] A. That provides whether you have a helper or not.

Q. If you didn't have a helper they would use a hand cart; if they did have a helper? A. They would carry them.

Q. Not use a hand cart? A. Right.

Q. You say it takes four and a half hours to barbecue a pit of ribs? A. Yes.

* * * * *

[14] Q. But you are indicating that they don't bring ribs up during the day? A. No.

Q. Not until after 4 o'clock? A. After they open at 4 o'clock.

Q. I see. Then do I understand from what you are testifying that you are storing normally about 400 pounds of ribs downstairs and they remain there until evening at which time they are brought up? After you leave? A. That is right.

* * * * *

[39] Q. When Mr. Smith would come down there he was there to inspect the food and the gas and everything to see that it was clean and it was proper, right. Wouldn't that be the reason he was there in your kitchen? A. To inspect the grease and the food, yes.

Q. So he was there as an inspector for the District of Columbia? A. Yes.

* * * * *

[40] Q. Yes. You said sometimes they come down by handtruck and sometimes by two men? A. Yes.

Q. Who are they delivered by? A. Swift & Co.

Q. They are not employees of Arbaugh's? They are Swift & Co. men that deliver them to you? A. Yes, correct.

Q. After you cook spare ribs and you refrigerate them with the sauce, there is no grease that is dripping all over these pans after they have been in the refrigerator for four hours? A. No grease.
